United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-7209

United States Court of Appeals For the Second Circuit

IRVING ELLENTUCK et al.,
Plaintiffs-Appellants,

-against-

JOSEPH P. KLEIN et al.,
Defendants-Appellees.

On Appeal from a Judgment of the District Court, Southern District of New York

Appellants' Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

IRVING ELLENTUCK et al.,

Plaintiffs-Appellants

-against-

Docket No. 77-7209

JOSEPH B. KLEIN et al.,

Defendants-Appellees

- X

BRIEF FOR PLAINTIFFS-APPELLANTS

This is an appeal from an order and judgment of the District Court, Southern District of New York, dismissing, with prejudice, an amended civil rights complaint, before answer, on the sole ground of res judicata.

Although the complaint sets forth four separate causes of action based on facts varying as to context and timing, it was dismissed as a whole without any distinction as to the application of the principles of res judicata to each of the separate causes of action. (42A through 53A)

The defendants had moved before answer for dismissal under Rule 12(b)(1) and 12(b)(6). Defendants Richmond Hill Savings Bank and Julius Granirer moved without affidavit. The other defendants attached affidavits to their motion papers which were mainly vehicles for the introduction of exhibits in alleged support of their res judicata contentions. Because the facts are virtually undisputed, plaintiffs cross-moved for partial and/or complete summary judgment under Rule 56 on affidavit and exhibits and asked that the papers be also considered in opposition to defendants' motions. (Record, documents 5, 7, 10, 12, 16).

It is too well established law to need any extensive citation that in cases of dismissal before answer, particularly in civil rights cases, the facts alleged in the complaint (3A through 40A) must be accepted as true, Gumer v.

Sheason Hammil & Co. Inc., 516 Fed. 2d 283, (CANY); U.S. v. J.B. Williams Co. Inc., 498 Fed 2d 414; Friedman v. Myers 482 Fed. 2d 435; and that for a judgment in a prior action to be a bar to reaching the merits in a subsequent action, the prior action must have been rendered by a court of competent jurisdiction, been a final judgment on the merits and the same cause of action and the same parties or their privies must be involved in both suits. Herendeen v. Champion Intern. Corp. 525 Fed 2d 130 (CANY); United States v. Harrison County, Miss. 399 Fed. 2d 485, rehearing denied 414 Fed. 2d 784, Cert. denied 397 U.S. 98, 90 S. Ct. 425. Res judicata and estoppel must be pleaded affirmatively and proved beyond a reasonable doubt.

The alleged basis for the claim of res judicata is the decision of the Board of Standards and Appeals of the City of New York, dated March 25, 1975, granting a variance to the subject premises (113A) and the confirmation of that variance in an Article 78 proceeding by the Appellate Division of the State of New York, Second department dated March 1, 1976, and proceedings thereafter. (59A, 60A, 61A, 62A, 65A)

The district Court is in error because in short; (1) the four causes of action set forth in the complaint herein are not the same as the application for a variance or the Article 78 proceeding seeking its review; (2) the first cause of action is supported not barred by the principle of res judicata (82A through 97A) (3) the variance granted by the Board of Standards and Appeals was not granted by a tribunal competent to do so in that it purported to vary the New York State Multiple Dwelling Law which the Board is by statute prohibited from doing; (4) The alleged confirmation by the Appellate Division Second Department of said variance is void in that the decision thereon was participated in by a disqualified judge; (5) the scope of review permissible in an Article 78 proceeding is strictly limited by statute and cannot reach matters

extraneous to the record of proceedings actually before the Board; (6) the Court of Appeals of the State of New York has no original jurisdiction and may not review matters not in the article 78 proceeding based on the record before the Board, or review void decisions and (7) that in any event it is the accepted policy of this Circuit not to extend the principles of res judicata in civil rights cases involving procedural due process.

Each cause of action will be separately discussed to refute the claim of res judicata.

FACTS

The facts and history of the prior litigation leading to and supporting the instant civil rights suit and the four causes of action therein, have been set forth in more than adequate detail in the amended complaint (3A thru 40A).

The facts are practically undisputed and are further verified by public records.

This action arises out of the struggle of the home owners of Belle Harbor, Rockaway, Long Island, a middle class community, to protect and preserve their neighborhood and to prevent its deterioration and the devaluation of their properties by unwarranted and illegal violations of the zoning law and the multiple dwelling law.

A very brief statement of some of the facts will be made at this time. Further facts will be presented as each cause of action is separately discussed.

In June 1972, defendant Kimball, a builder, residing and operating in the Belle Harbor community for many years, purchased a three story and basement old wooden frame building of 1908 vintage from the Sisters of Reparation of the Congragation of Mary, Inc., a religious charitable non-profit organization. The subject building known as 131-16 Rockaway Beach Boulevard, is located in Belle

Harbor, a fire-hazardous seashore community subject to high winds, in an R-2 zone, zoned for single family detached dwellings and certain community uses only. Prior to purchase by Kimball, the Sisters had used the premises as a convent and on a charitable non-profit basis as a home for aged and/or homeless women, a conforming use under the zoning law. Shortly after purchase, Kimball filed plans to alter the premises to a Class A multiple dwelling containing 14 apartments and one for a superintendent, and on November 8, 1972 was successful in obtaining a permit therefor. (4A through 11A)

Upon discovery of what Kimball was doing, some of his neighbors consulted with their association, the Belle Harbor Property Owners Association. The association, by its then president, Charles H. Fier, protested to H. Irving Sigman, the Superintendent for the Building Department of Queens, that the permit was illegal and asked that it be revoked. (11A, 12A)

The protest was unsuccessful and the association then retained the undersigned to bring action to vacate the permit and to permanently enjoin the alteration. Since at that time such suits could be brought only in the name (s) of individual property owners, the Association obtained the consent of the owners of some 22 parcels in the Belle Harbor area, to act as plaintiffs, the Association paying all legal fees and disbursements.*

In December 1972, action was instituted in the Supreme Court, Queens County in the names of these owners (68A et seq.). Upon starting action, a temporary restraining order to stop construction during the litigation was sought, but was opposed by Kimball and denied, the Court holding that since Kimball was on notice, he proceeded at his peril and it was he, not the

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* The law has since been changed by Douglaston Civic Ass. v. Galvin, 36 N.Y.2d 1, 364 N.Y.S. 2d 864, and associations may now bring such actions on behalf of their members.

plaintiffs who were in danger of loss (12A). Unfortunately, events have proved otherwise.

After an initial setback in the lower court (13A) on April 29, 1974, (13A) the Appellate Division, Second department reversed the lower court, holding that defendant Kimball's proposed alteration from a single family dwelling to a multiple dwelling was illegal and the permit null and void (44A.D. 2d 714) (55A, 56A, 57A, 58A, 13A, 14A).

The permit was vacated and defendant Kimball was permanently enjoined from further construction under the permit and from altering the building to a Class A multiple dwelling.

Unfortunately Kimball had in the meantime completed construction and on or about March 13, 1974 had obtained a certificate of occupancy thus precipitating the additional long litigation hereinafter to be discussed. (14A)

AS TO THE FIRST CAUSE OF ACTION

POINT I

THE APRIL 29, 1974 DECISION BY THE APPELLATE DIVISION, SECOND DEPARTMENT THAT THE SUBJECT PREMISES AT THE TIME OF PURCHASE BY KIMBALL WAS NOT A MULTIPLE DWELLING, UNDER THE PRINCIPLES OF RES JUDICATA IS FINAL AND BINDING

The April 29, 1974 decision of the Appellate Division reads in part as follows (55A, 56A):

> "In an action by owners and residents of real property adjoining or near real property owned by defendant Kimball Construction Co. Inc., for a judgment (1) declaring said defendant's proposed alteration of its building from a single-family to a multiple dwelling to be a violation of the zoning resolution of the City of New York, (2) vacating the permit for the alteration and (3) enjoining the alteration, plaintiffs appeal from a judgment of the Supreme Court, Queens County, entered July 2, 1973, in favor of the defendants, dismissing the complaint, after a non-jury trial.
>
> Judgment reversed, on the law and the facts, with costs to appellants against the defendant, Kimball Construction Co. Inc.; it is adjudged that the permit is null and void and that the proposed alteration

> is illegal; the permit is vacated and the defendant, Kimball Construction Co. Inc. is permanently enjoined from further construction under the permit and from altering the building to a Class A multiple dwelling.
>
> *
>
> In 1946 the Department of Housing and Building of the City of New York marked its records as follows:
> 'Accept as a Class B heretofore converted dwelling.'
>
> *
>
> However we find the evidence overwhelming * * * that from approximately 1951 to 1972 the Sisters operated the premises as a convent and, on a charitable non-profit basis, primarily as a home for homeless and/or aged women. This usage is a conforming usage under R-2 classification (detached residences) imposed by the zoning ordinance resolution that became effective December, 1961 * * * Although conversion from one non-conforming use to another non-conforming use was authorized by law, we find that the evidence clearly established that the Class B classification was clearly abandoned by the Sisters' conforming usage from 1951 until the 1972 transfer to Kimball, and that in any event, in view of the character of the neighborhood, the nature of the conversion and the dismal assessment of the conversion by Borough Superintendent Sigman of the department of Buildings of the City of New York on December 8, 1972, the 1972 alteration permit permitting the conversion should not have been granted."

In that action resulting in the above decision, which was not further appealed, the parties were the same as in the first cause of action in the complaint at bar. It is true that not as many plaintiffs are individually named, but with the changes in the law and the thinking re class actions, that is no longer necessary.

The present first cause of action which is for damages for civil conspiracy is different from the cause of action in the prior case, but it arises out of matters that were fully litigated between the parties, and since there was no further appeal from that decision, the findings made by the Appellate Division therein are now absolute and final and bind the parties and their privies, whether the nomenclature is res judicata, collateral estoppel or issue preclusion.

The finding is now absolute that when Kimball purchased the premises,

any and all right that the subject building might at one time have had to be classified as a multiple dwelling had been forever lost. The Appellate Division decision notes that the building had been accepted by the Building Department in 1946 as a heretofore converted dwelling (55A).

The Multiple Dwelling Law of the State of New York defines "converted dwelling" as follows: (McKinney's Consolidated Laws of New York, Vol. 35-A, Multiple Dwelling Law, Art. 1, Sub 4 (10) at page 12):

> "10. A 'converted dwelling' is a dwelling (a) erected before April eighteenth, nineteen hundred twenty-nine, to be occupied by one or two families living independently of each other and subsequently occupied as a multiple dwelling ***"

When the subject building lost its converted multiple standing it had to revert to its original classification, that is a single family dwelling and was thereafter subject to all provisions of law applicable to one family frame wooden buildings. When the Appellate Division stated that the proposed alteration was from "a single family to a multiple dwelling" it obviously found as a fact that the building at the time of Kimball's purchase had reverted to its single family status.

Borough Superintendent Sigman, the then Commissioner of Buildings Stein, and Inspector Erling Karlsen were all defendants with Kimball in that prior state court action. They are all equally bound by the above Appellate Division decision. (68A et seq.)

POINT II

THE PRINCIPLE OF RES JUDICATA SUPPORTS PLAINTIFFS' FIRST CAUSE OF ACTION FOR DAMAGES FOR CONSPIRACY, TO FAVOR KIMBALL AND DEPRIVE PLAINTIFFS OF THEIR CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION OF THE LAWS

Borough Superintendent Sigman, Commissioner Stein and Inspector Karlsen are also named with the Kimballs as defendants in the present first cause of action. (4A) However it has been reported that Commissioner Stein has left the

jurisdiction and could not be served and Inspector Karlsen has died, so that of the government officials sued in the first cause of action, only Sigman remains.

The April 29, 1974 decision of the Appellate Division makes it clear that Sigman and his colleagues committed an illegal act when they authorized and/or issued the illegal permit. Officials who act illegally and cause damage may be sued by those damaged. This is fundamental tort law. Where this was done in furtherance of a conspiracy to deprive those damaged of the equal protection of the laws the Federal civil rights statutes give those damaged the supplemental right to sue in the Federal courts.

Any further argument or litigation as to the illegality of the acts of these officials in issuing the illegal permit is forever foreclosed under the principle of res judicata by the above appellate Division decision. The only issue pertaining thereto that may now be raised is whether the illegal act was done in good faith in the exercise of an official function. However, as the corporation counsel, has himself noted in his affidavit on behalf of Sigman, (Record document 21) good faith is an affirmative defense which must be pleaded and proved.

The complaint herein, paragraphs 38, 39, 57, 58 thru 71 (11A, 14A, 15A, 16A, 17A) sets forth a series of acts by Sigman that negates any claim of good faith. Plaintiffs herein had sought partial summary judgment on this issue, leaving the matter of damages for the trial court, because they believed the public records and documentary proof were sufficiently strong not only to support a prima facie case in their favor but to warrant a directed verdict. However since that motion was denied and there is no appeal from the denial, some of the facts supporting conspiracy will be briefly restated.

The decision of the Appellate Division of April, 29, 1974 refers to the "dismal assessment" of the proposed conversion by Sigman in his interdepartmental memorandum dated December 8, 1972 (98A). Even if he were honestly mistaken in believing that the building was still a multiple dwelling, the provision in the zoning law permitting conersion from one non-conforming use to another is permissive and not mandatory. (109A, 111A, 112A) When Sigman in the memorandum states "it is a matter over which we have no control" he was not giving a correct version of the building department's powers and obligations. Where he knew, as he states, that the proposed alteration provided only bare minimum safety requirements (one interior wooden stairway for all floors) and was not in conformity with the neighborhood and was undesireable, it was not only within his power but his duty to refuse a permit for such an alteration. The lack of care as to requirements for fire protection evidenced by Sigman in allowing the permit becomes even more patent when we find, as Kimball admits in the affidavit supporting his motion to dismiss, that he Kimball, was subsequently ordered to install fire escapes and a sprinkler system, in the subject premises (probably by the Fire Department) (R document 5).

The law relative to the power of the Building Department to allow alterations to wooden frame buildings is as follows:

FROM THE BUILDING CODE OF THE CITY OF NEW YORK

"Sec. C-26-100.7 Variations. The requirements and standards prescribed in this code shall be subject to variations in specific cases by the Commissioner or by the Board of Standards and Appeals under and pursuant to Section 1804(4)(b) and Section 666 of the New York City Charger as amended.

Sec. 26-103.6 Alterations to multiple dwellings and conversions to multiple dwellings. At the option of the owner, regardless of the cost of the alteration or conversion, an alteration may be made to a multiple dwelling in accordance with all the requirements of this code or in accordance with all the applicable laws in existence prior to December 6, 1968, provided the general safety and public welfare are not thereby endangered. (emphasis added)"

The present law absolutely forbids the alteration or construction of more than provision for two families in a wooden frame building.

The law prior to December 6, 1968 relative to frame buildings was as follows:

> "(4.1.5) Sec. C26-250.0 Enlargement of wood frame structures. Any frame residence structure erected before January first, nineteen hundred thirty-eight may be altered or enlarged without changing the class or construction and in accordance with sections C26-248.0, C26-249.0 C26-256.0, if such structure is to be occupied after such alteration or enlargement, exclusively as a one or two family residence, and contains at most eight liveable rooms per family. The requirements of this section shall apply to all buildings where central heating or approved space heaters are to be installed." (emphasis added)

Obviously even under the law prior to December 8, 1968 a wooden frame building could not be altered to house more than two families.

Section 1804(4)(b) of the New York City Charter reads as follows, relative to the power and duties of the Commissioner of Buildings, subject to review by the Board of Standards and appeals. Section 1804(4)(b) Department of Buildings:

> (b) to require that the construction or alteration of any building or structure, including the installation or alteration of any service equipment therein, shall be in accordance with the provisions of law and the rules, regulations and orders applicable thereto; but where there is practical difficulty in the way of carrying out the strict letter of any provision of law relating to buildings in respect to the use of prescribed materials, or the installation or alteration of service equipment, or methods of construction where equally safe and proper materials or forms of construction may be employed in a specific case, he may permit the use of such materials or such forms of construction, provided that the spirit of the law shall be observed, safety secured and substantial justice done but he shall have no power to allow any variance from the provisions of any law in any other respect except as expressly allowed therein, or from any appellant ruling of the Board of Standards and Appeals." (emphasis added)

As Borough Superintendent of Buildings for Queens, Sigman knew or is chargeable with knowing the provisions of the zoning law, the multiple dwelling law and the building Code of New York City. He knew or should be charged with knowing that he should not have granted this permit, as the Appellate Division states "in any event". When he did so, the conclusion is inescapable that he was doing so

to favor Kimball.

Other allegations in the complaint, supported by the public records and documentary evidence, make the conspiracy to circumvent the law for Kimball's benefit even more patent, some of which are as follows:

Kimball was permitted to start construction even before the permit was issued, a violation of law; (11A-par. 36 of complaint) he was permitted to rent apartments in the premises long before the illegal certificate of occupancy since revoked, was issued, another violation of law renting as early as February 1, 1973 even before the plenary suit to vacate his permit was tried (Feb. 21-23, 1973) as is evidenced by the leases which Kimball himself submitted to the Board of Standards and Appeals on his application for a variance (13A, R document 16, leases attached) (Obviously if he could install tenants as early as February 1, 1973, after obtaining a permit on November 8, 1972, he must have completed a large portion of the alteration by that time and must have started construction before the permit was issued); although Sigman was himself a party to the plenary suit and the appeal therefrom, he nevertheless issued a certificate of occupancy for the illegal Class A multiple dwelling on March 13, 1974 while the appeal was pending and prior to the April 29, 1974 decision of the Appellate Division.

The above actions, are in themselves indicative of the design or conspiracy to enable Kimball to convert to an illegal multiple Class A dwelling. But Sigman's actions thereafter are even more potent proof.

On May 17, 1974, after the Appellate Division decision, Commissioner Walsh directed Sigman to apply to the Board of Standards and Appeals for revocation of the certificate of occupancy (15A, 99A). Sigman stalled and did not do so until June 11, 1974 (mistakenly stated as July 11 in par. 61 of the complaint) (15A) and then enclosed a copy of the reversed lower court decision, in an obvious attempt to influence the Board not to revoke (100A).

On June 18, 1974 he sent another letter to the Board calling its attention to Kimball's "hardship" and asking for an "expedite"; (15A, 101A) then when the Board granted the expedite and set hearing for July 23, 1974, he came in person and without reason asked for and obtained a long adjournment to September 24, 1974 (15A) and not until plaintiffs brought a motion to punish him for contempt and the law department sent him a letter urging him to proceed with revocation, did he finally and cursorily make the request (102A).

The certificate of occupancy was revoked on October 1, 1973 (103A) but even thereafter Sigman's actions show a continued effort to help Kimball; a violation was placed on the building for illegal occupancy a criminal offense, and Sigman was directed to vacate the building (104A) but, on information and belief nothing was done to enforce the law, and Kimball continued with impunity to break the law, to continue having illegal tenants and to collect rent without a certificate of occupancy (16A).

On October 23, 1974 Kimball applied to the Board of Standards and Appeals for a variance on the ground that he was suffering great hardship because he had spent a great deal of money (sic) on the alteration pending the litigation (21A). The Board, by a vote of three for, one against and one abstaining on March 25, 1975 granted the variance, but reduced the number of apartments to eleven with one for a superintendent (22A, 27A, 113A).

During all this time Kimball continued without any real interference by the building department to operate the building as a Class A multiple and collect rents.

Whether or not the variance granted was legal or will eventually be found to be illegal is not the issue in this first cause of action.

By means of granting an illegal permit, Sigman enabled Kimball to continue an illegal alteration during the litigation and lay the basis for a subsequent hardship application. Had Sigman followed the dictates of statute, and denied

the permit, Kimball would have been forced, if he still wanted the alteration, to apply to the Board of Standards and Appeals for a variance. As the law reads at that time having spent no money on the alteration, he could not claim hardship, and there was no provision in the law under which the Board of Standards and Appeals could have granted such a variance.

Because of the illegal acts done with concerted design by the defendants as set forth in the first cause of action herein, the plaintiffs have been deprived of their constitutional rights to the equal protection of the laws, have been forced to engage in expensive and oppressive litigation in an attempt to enforce their rights and protect their properties, and their properties are being devalued substantially by the variance which to date Kimball has been successful in obtaining and keeping.

What transpired in the subsequent litigation after the variance was granted on which the District Court bases the finding of res judicata, has no bearing whatsoever on this first cause of action, except as to damages.

It is reversible error for the District Court to have dismissed this first cause of action before answer. What is even more erroneous is the dismissal with prejudice. Under the facts hereinabove and in the complaint set forth, plaintiffs have a valid tort action against these defendants even in a state court. This cause of action has never been litigated in any court. They chose to bring the action in the federal Courts under the Civil rights statute. Their choice of forum may not be disturbed.

Should the federal court for some reason, not take jurisdiction of this action, the plaintiffs should still be able, if they so desire to process their claims in the state courts. A federal court should not foreclose plaintiffs' constitutional rights of access to the courts for redress of grievances, by dismissing an unlitigated and unresolved action with prejudice. Reasonable access

to courts is guaranteed by the due process clause of the Fourteenth Amendment. De Witt v. Pall 366 F2d 682.

AS TO THE SECOND CAUSE OF ACTION

The second cause of action seeks three forms of relief (1) damages for civil rights conspiracy, (2) declaratory judgment that the variance granted by the Board of Standards and Appeals on March 25, 1975 is absolutely void as having been made without jurisdiction and (3) permanent injunction against maintaining a multiple Class A dwelling in the subject premises (17A through 29A and 38A, 39A).

The facts alleged in the complaint, the public records and documentary proof, and the law which will be hereinafter cited, support these demands for relief.

POINT III

THE BOARD OF STANDARDS AND APPEALS BY EXPRESS STATUTORY MANDATE IS PROHIBITED FROM VARYING THE PROVISIONS OF THE NEW YORK STATE MULTIPLE DWELLING LAW WHICH FORBIDS THE ALTERATION OF A FRAME BUILDING TO HOUSE MORE THAN TWO FAMILIES.

The Board of Standards and Appeals is a creature of statute. It has only the powers expressly conferred upon it. It cannot under any circumstances do what it is expressly forbidden to do.

Under Sec. 11 sub (f) of the Municipal Home Rule Law of New York a city is forbidden by statute from making any local law which supersedes a state statute. It reads as follows:

"Sec. 11. restrictions on the adoption of local laws

1. Notwithstanding any provisions of this chapter, the legislative body shall not be deemed authorized by this chapter to adopt a local law which supersedes a state statute, if such local law

* * * * *

f. applies to or affects any provisions * * * or changes any provisions of the multiple dwelling law, except that in a city of one million persons or more, the provisions of local law for the enforcement of the housing code which is not less restrictive than the multiple dwelling law may be applied in the enforcement of the multiple dwelling law."

Following that prohibition, the Charter of the City of New York sets forth in Sec. 666 thereof (123A and 124A) the powers of the Board of Standards and Appeals

and the limits on those powers to vary the provisions of the Multiple dwelling Law as set forth in Sec. 666(6)-2 of the Administrative Code of the City of New York, which reads as follows:

ADMINISTRATIVE CODE OF THE CITY OF NEW YORK

"Sec. 666(6)-2. MULTIPLE DWELLING LAW NOT TO BE VARIED. The Board may not vary or modify the multiple dwelling law nor any order, regulation or ruling of the Commissioner of Buildings in relation to the Division of Housing, except as provided in Section three hundred ten of the multiple dwelling law, and except that such order, regulation or ruling issued under the provisions of Title D of chapter twenty-six of the code may be varied or modified by the Board to the extent permitted by such title in the manner and subject to the conditions therein specified. This section shall not deprive the Board of any of its powers of review on appeal."

Chapter 26 of Title D has no application to the case at bar. Section 310 of the Multiple Dwelling Law referred to above reads as follows:

MULTIPLE DWELLING LAW

"Sec. 310, BOARD OF APPEALS

* * *

2. Where the compliance with the strict letter of this chapter causes any practical difficulties or any unnecessary hardship, the Board shall have the power on satisfactory proof, at a public hearing, provided the spirit and intent of this chapter are maintained and public health, safety and welfare preserved and substantial justice done, to vary or modify any provision or requirement of this chapter or any rule, regulation, supplementary regulation, ruling or order of the department with respect to the provisions of this chapter as follows:

* * *

C. For multiple dwelling and buildings erected or to be erected or altered pursuant to plans filed on and after December fifteenth, nineteen hundred and sixty-one, or before such date provided such plans comply with the provisions of paragraphs d of subdivision one of sections 26, provisions relating to: (emphasis added)

(1) Height and bulk
(2) Required open space; or
(3) Minimum dimensions of yards and courts."

The plans for the subject alteration were filed long after the cut-off date of December 15, 1961, so that the power of the Board to grant a variance in this case was limited to height or bulk of the building, required open spaces and yard dimensions. (even if the building was still a multiple dwelling).

This article 310 then does not give the Board the power to vary the provisions of Section 56 of the Multiple dwelling law, which forbids more than two families in

a wooden frame building.

At this point it is interesting to note that Section 310 was not passed or adopted until 1956. Prior to that time there was no provision whatsoever in the Multiple Dwelling Law for any variation whatsoever.

In the 1946 edition of McKinney's Consolidated Laws of New York, Vol. 35-A on Multiple Dwellings, in a preface entitled "Historical Development of the Multiple Dwelling Law" by the Honorable MacNeil Mitchell, Member of the Assembly and Chairman of the Joint Legislative Committee on Housing and Multiple Dwellings, he notes at page XVI, relative to the dangers of permitting variances:

> "Having learned a lesson from the previous policy of granting discretionary powers and permitting variances, the legislature this time made it clear that the requirements of law were not to be waived or relaxed by any municipal agency."

It is thus obvious that the slight relaxation permitted ir 1956 by the newly added Sec. 310 may not be read to permit any other variance than that specifically permitted by that section.

Sec. 310 which strictly limits the powers of the Board to vary the multiple dwelling law does not give the Board the power to vary any other section such as Sec. 9 and 13 thereof.

Sec. 56 of the Multiple Dwelling Law states:

> "1. Except as provided in section one hundred ninety-three and subdivision seven of this section, no frame multiple dwelling shall be erected and no frame dwelling not used as a multiple dwelling on April eighteenth, nineteen hundred twenty-nine shall be altered or converted to such occupancy."

Sec. 13 of the Multiple Dwelling Law limits the provision as to buildings used as such on April 18, 1929, to those in which there has been no change of use since that date as follows:

> Sec 13."*** nothing in this chapter shall be construed to require any change in the construction, use or occupancy of any multiple dwelling lawfully occupied as such on April eighteenth nineteen hundred twenty-nine, under the provisions of local laws, ordinances, rules and regulations

applicable thereto on such date; but should the occupancy of such dwelling be changed to any other kind or class after such date, such dwelling shall be required to comply with the provisions of Section 9." (emphasis added)

Art. 1, Sec. 4 (7) McKinney's Consolidated Laws of New York, Vol. 35-A on Multiple Dwellings at pages 10 and 11, defines multiple dwellings and then states:

"A 'multiple dwelling' shall not be deemed to include a hospital, convent, monastery, asylum or public institution *** (emphasis added)

As has been shown above, the Appellate Division ruled that the occupancy of the heretofore converted dwelling had been changed since 1929 when it found that the Sisters had "clearly abandoned" the Class B multiple dwelling status by using the building as a convent and on a charitable non-profit basis as a home for aged and/or home less women. That finding is final and cannot now be changed. The Board therefore had no power to consider this building as anything but a single family dwelling and since it is a frame wooden building had absolutely no authorization to allow conversion to use for more than two families.

Since it is obvious that there has been a change in occupancy since April 18, 1929, Section 13 dictates that reference must be made to Section 9.

Multiple Dwelling Law, Section 9(3) states

"A dwelling of one class or kind, altered or converted after April eighteenth nineteen hundred twenty-nine to another class or kind except as hereinafter in this section and in article six and seven otherwise provided, shall thereupon become subject to all the provisions of this chapter applicable to a building of that class or kind erected after such date to which it is altered and or converted."

Article 6 regulates the conversion of buildings and specifically states in Sec 170 thereof that the provisions of Sec. 56 shall apply to conversions of frame buildings.

Article 7 applies to tenements.

Section 9 does contain an exception in subdivision 6 that a tenement converted to another use may be reconverted to a tenament, but this certainly does not help the defendants, since the building was never a tenement.

A thorough reading of the entire Multiple Dwelling Law does not contain a single exception which would permit the conversion of the subject building to a

multiple dwelling of any kind.

When the Board granted a variance permitting twelve families in an old wooden frame building without a vested right to be or continue as a multiple dwelling, it did something for which it had no jurisdiction whatsoever and something which was absolutely forbidden by law.

As a creature of statute, the Board can do nothing which the law does not expressly authorize and certainly nothing which the law expressly forbids.

The Board's determination granting the variance is therefore absolutely void, under the law and the decisions.

POINT IV

A DETERMINATION OR JUDGMENT BY A COURT OR AN ADMINISTRATIVE TRIBUNAL ENTERED WITHOUT JURISDICTION IS ABSOLUTELY VOID AND OF NO EFFECT WHATSOEVER

In Altschul v. Ludwig 216 N.Y. 459, 469, 470 the New York Court of Appeals ruled p. 469, 470:

> "The Board have no authority outside of and beyond the statute *** While *** an appeal may be taken to the Board of examiners from the refusal of the superintendent of buildings to approve *** it does not confer upon the Board of Examiners the right to approve a construction not sanctioned by the building code *** The courts will not review discretionary acts of the Board, but when the Board acts beyond its limited statutory powers, its action is void ***"

The Board does not exercise legislative powers. Matter of Levy v. Board of Standards and Appeals 267 N.Y. 347, 352, 353.

The Board of Standards and Appeals has no power by its rules to amend or alter express statutory provisions. Pollard v. Triva Building Corp. 291 N.Y. 19, 23.

In Matter of Baltimore Mail SS Co. v. Fawcett, 269 N.Y. 379, where a lower court claimed jurisdiction, affirmed by the Appellate Division and leave to appeal denied by the Court of Appeals, appellants then sought a writ of prohibition which was denied and the denial affirmed by the Appellate Division. The Court of Appeals then took the appeal and held, (p. 383) that a decision or order of a court or

Magistrate acting without jurisdiction is void, and (on page 388) that appellants could again challenge the decision since a court without jurisdiction of the subject matter of an action cannot acquire jurisdiction by an erroneous decision that it has jurisdiction, and (on page 390) that an erroneous decision as to its own jurisdiction by a court has no conclusive effect on the parties, that the party aggrieved may resort to extraordinary remedies where ordinary remedies have been exhausted and need not seek certiorari to the Supreme Court by direct appeal.

In O'Donoghue v. Boies 159 N.Y.87 at page 99, the New York Court of Appeals states:

> "The want of jurisdiction to render the particular judgment may always be asserted and raised directly or collaterally either from an inspection of the record itself when offered into evidence in behalf of the party claiming under it, or from extraneous proof which is always available for that purpose. There is but one solitary exception to this rule, and that is in a case where jurisdiction depends on a fact that is litigated in a suit and is adjudged in favor of the party who avers jurisdiction. *** The scope and nature of this exception to the general rule may be illustrated by a very familiar case. It is provided by statute that a judge shall not sit in a case if he is related to either of the parties within the sixth decree***if such relationship exists in fact the judge is incapable of acting as a member of the court. But whether the relationship exists involves an inquiry as to the facts, and if there is conflict in the evidence relating to that question, the determination is of such a character that the question of jurisdiction cannot be raised collaterally, but the error in judgment, if any, must be corrected by direct review."

Where a court's determination that it has jurisdiction is a mere legal conclusion the want of jurisdiction may always be asserted and raised directly or collaterally Friedman v. State of New York 301 N.Y.S. 2d 484, 24 A.D. 2d 528.

That cannot be legal which is forbidden by law. Peck v. Belknap 130 N.Y. 394, 395.

A judgment entered without authority is a nullity. There is no obligation to appeal from a void judgment. Its invalidity may be asserted at all times. Bouker Contracting Co. v. Neale 161 A.D. 617, 146 N.Y.S. 894; Kamp v. Kamp 69 N.Y. 212.

There is no obligation to move to vacate a void judgment. Ferguson v.

Crawford, et al. 70 N.Y. 253; Malone v. Citarella 7 A.D. 2d 871, 182 N.Y.S. 2d 200; Matter of Doey v. Howland Co. 224 N.Y. 30.

The availability of attack against a void judgment is not restricted to the parties. In re Matter of Trevor 309 N.Y. 389, 131 N.E. 2d 561.

There is no time limit for vacating judgment void for lack of jurisdiction Wheelock v. Wheelock 3 A.D. 2d 25, 157 N.Y.S. 2d 752, aff'd 4 N.Y.2d 706, 171 N.Y.S. 2d 99; Pacek et al vs. Ferrar 258 A.D. 772, 14 N.Y.S. 2d 814.

A void judgment is no judgment at all. Jordan v. Gilligan 500 Fed. 2d 701 cert. denied 95 S. Ct. 996, 421 U.S. 991, 44 L Ed. 2d 481; Graciette v. Star Guidance 66 F.R.D. 424 (D.C.N.Y.)

A judgment by a court lacking competence is void, even where party against whom judgment was rendered did not obect to lack of competency. Spatt v. State of New York (E.D.N.Y.) 361 F. Supp. 1048, aff'd 414 U.S. 1058.

POINT V

A VOID JUDGMENT OR DETERMINATION OF AN ADMINISTRATIVE BODY MAY ALWAYS BE REVIEWED IN A FEDERAL COURT

The rules of res judicata, comity or issue preclusion do not apply to void judgments and determinations. Such judgments and decisions may be collaterally attacked wherever and whenever they are raised. They may always be reviewed in the Federal courts.

An early leading case on the subject is the case of Thompson v. Whitman 85 U.S. 457. From the syllabus:

> "1. Neither the constitutional provisions that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered into evidence was rendered.
>
> 2. The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist.

3. Want of jurisdiction may be shown either as to the subject matter or the person, or, in proceedings in rem, as to the thing."

The invalidity of a judgment for want of jurisdiction may be asserted at any time in any proceeding in which the judgment comes in issue. Daniels v. Thomas 225 F. 2nd 795; Jordan v. Gilligan supra, 500 Fed. 2d 701 etc.

A void judgment cannot be given the effect of res judicata in other litigation. United States v. U.S.F. & G. 309 U.S. 506, 514.

Where there is clear usurpation of power a judgment will be declared void. Lubben v. Selective Service System 453 Fed. 2d 645.

A state court judgment is not entitled to full faith and credit in a second forum if that judgment was rendered without jurisdiction over the person or subject matter and whether there was such jurisdiction is always open to inquiry in the second forum. Comprehensive Merch. Cat, Inc. v. Madison Sales Corp. 521 fed 2d 1210; Franklin National Bank v. Krakow 295 Fed. Supp. 910; Pistorino & Co. v. U.S. 333 Fed. Supp 541, 545.

POINT VI

THE DETERMINATION GRANTING THE VARIANCE IS NOT A BAR ON RES JUDICATA OR ANY SIMILAR PRINCIPLE TO PLAINTIFFS' SECOND CAUSE OF ACTION

Since as has been shown, the Board had and has no jurisdiction to grant the subject variance violating the express prohibition against varying the multiple dwelling law, and a void determination cannot act as a bar to subsequent litigation, it must follow that plaintiffs' second cause of action cannot be barred on such or any related ground.

The defendants named in this second cause of action, knew or are chargeable with knowing that the Board has no jurisdiction to grant the subject variance and its decision to do so is absolutely void.

On October 1, 1974, on the basis of the Appellate Division decision of April 29, 1974, the Board of Standards and Appeals had vacated the illegal certificate

of occupancy by a vote of 4-1, Commissioner Agusta voting against revocation. Kimball had opposed the revocation on the alleged ground of hardship. Then on October 23, 1974 Kimball applied to the Board under Sec. 72-21 of the Zoning Law for a variance on the identical plea of hardship.

When Kimball made this application, both the Kimballs and the Board knew that Kimball was asking for something to which he was not entitled either as a matter of right, decided by the Appellate Division decision, or as a matter of favor, (a variance) because the building was a single family wooden frame dwelling, and that the Board had no power to give him the relief he sought. Hearings which were then held were nothing more than a smoke screen to attempt to show some semblance of legality. The claim of hardship was merely a vehicle to try to bring the application within the provisions of Section 72-21. But even this claim backfired when Kimball would not (obviously could not) substantiate his claim of vast expenditures by contracts, bills, vouchers, cancelled checks or payroll, etc. At first the Board directed him to produce this evidence, but when he refused, obviously recognizing that he could not, accepted his unverified and unsubstantiated statements as to costs.

The complaint alleges these facts and they may be verified from the certified record of proceedings in the Art. 78 proceedings. (22A, 23A, 24A, 25A)

The complaint also alleges the uncontrovertible fact that on January 27, 1975, a vice president of the Richmond Hill Savings Bank which holds the purchase money mortgage on the subject premises sent a letter (ex parte) to the Board asking for favorable consideration of the variance, and that one of the trustees of that bank, Julius Granirer a lawyer, had acted on the sale of the premises to Kimball and the granting and execution of the purchase money mortgage, both as attorney for the bank and the borrower (Kimball) from the bank (it is claimed with the consent of the bank). These facts are admitted (23A, 24A, 119A, 120A, 122A, R document 19).

The record also discloses that on Feb. 25, 1975 (122A) Granirer issued a statement to Kimball which was also sent ex parte to the Board, setting forth proposed additional charges for increasing the mortgage to $75,000, including a fee of $475 for his services representing the bank and additional $750. for his services to Kimball.

Such action by a trustee of a bank are absolutely forbidden by the banking law. Art. 6, ec. 247, sub. 2(a) of the New York State Banking Law states:

"2. Neither a trustee nor an officer of a savings bank shall

(a) Receive directly or indirectly and retain for his own use any commission on or benefit from any loan made by the savings bank, or any pay or emolument for services rendered to any borrower from the savings bank in connection with such loan, except as provided in section two hundred forty-nine"

Sec. 249, sub. 3 states:

"An attorney for a savings bank although he be a trustee thereof, may receive a reasonable compensation for his professional services, including examinations and certificates of title to real property on which mortgage loans are made by the savings bank; or if the savings bank requires the borrowers to pay all expenses of searches, examinations and certificates of title, including the drawing, perfecting and recording of papers, such attorney may collect of the borrower and retain for his own use the usual fees for such services, excepting any commissions as broker or on account of placing or accepting such mortgage loans."

Whether their interest in the case was to help Kimball or to cover up their own misfeasance in event the mortgage soured, and their actions in approving same questioned, both the Bank and Granirer are part of the conspiracy to obtain for Kimball the illegal variance to which he was not entitled, and they are equally culpable with the Kimballs and the three members of the Board who voted for the variance.

The principle of res judicata on which this second cause of action was dismissed has absolutely no applicability to the facts. The instant action is entirely different from the proceeding in which the variance was granted and against different parties and the dismissal is reversible error.

Nor does the fact that on April 1, 1976, the variance was confirmed by the Appellate Division Second department better the situation for the defendants, as will be hereafter shown.

AS TO THE THIRD CAUSE OF ACTION

The third cause of action seeks declaratory judgment declaring the decisions and orders of the Appellate Division, Second department dated March 1, 1976 and April 27, 1976, made in the Article 78 proceeding which plaintiffs brought to vacate and annul the determination of the Board granting the variance, and the judgment entered thereon, null and void, and enjoining the implementation thereof (29A through 35A, 39A).

After the Board granted the variance, on March 25, 1975, the Belle Harbor property owners who had opposed the variance, on March 27, 1975, petitioned in an Article 78 proceeding, pursuant to statute, to annul the variance (29A, 30A, 82A through 97A). Pursuant to the provisions of CPLR 7803, Special term, Queens County Supreme Court, by order dated October 31, 1975, (114A through 118A) referred the matter to the Appellate Division, Second department.

On March 1, 1976, the Appellate Division confirmed the Board's determinations (59A, 60A, 61A, 62A) (Ellentuck et al v. Klein et al. 51 App. Div. 2d 954, 380 N.Y.S. 2d 327) stating in its opinion as follows:

> "Expenditures made in good faith reliance on a subsequently invalidated permit may be properly considered on an application for a variance on the ground of hardship (Matter of Jayne Estates v. Raynor, 22 N.Y.2d 417). The Board of Standards and Appeals found that respondent Kimball Construction Co. Inc., was entitled to relief 'on the ground of practical difficulty and/or unnecessary hardship'. In view of the fact that Kimball had made vast expenditures in good faith reliance on the previously issued alteration permit, we agree with the assertion in the Board's answer that the denial of a variance would 'inflict a devastating financial blow'.
>
> This court's earlier decision (Ellentuck v. Stein 44 A.D.2d 714) related solely to the propriety of the issuance of the alteration permit. It did not foreclose consideration of the more expansive issues relevant to a variance application before the Board of Standards and Appeals. The fact that some of the issues before the Board were discussed on an 'arguendo' basis

> In this court's prior decision did not preclude the Board's intensive consideration of those factors, based on additional evidence (including a personal inspection of the premises and neighborhood), and its conclusion that those factors were not as 'dismal' as they had appeared to be in the earlier proceeding (relating to license issue) and, further, that they were outweighed by the elements of hardship"

Plaintiffs, petitioners in that proceeding, then filed a notice of Appeal to the Court of Appeals as of right on constitutional grounds.

Defendant Kimball then moved to dismiss that appeal. Before petitioners could answer the motion to dismiss, they discovered that one of the judges who had participated in that decision, Judge Henry J. Latham, was a trustee of the Richmond Hill Savings Bank which had issued and held the purchase money mortgage on the subject premises and which had intervened in the variance proceeding before the Board of Standards and Appeals, and that he was a co-trustee of Julius Granirer who had acted as attorney for Kimball in the purchase of the premises, and for both the bank and Kimball on the purchase money mortgage, and that therefore, under New York Law, he, Judge Latham, had been disqualified and the decision in which he had participated, void. (121A, 31A, 32A)

Petitioners then in their papers opposing Kimball's motion to dismiss their appeal as of right, advised the Court of Appeals of this situation as the decisions require (Seaward v. Tasker 143 N.Y.S. 257, 267) and also that they were bringing a motion in the Appellate Division to vacate its March 1, 1976 decision confirming the Board's determination on the ground of the Judge's disqualification (33A). The Court of appeals dismissed the appeal as of right with the statement that no constitutional questions were directly involved (63A). (Ellentuck v. Klein 39 N.Y. 2d 743). Petitioners then made a motion for leave to appeal and that was denied (66A). (Ellentuck v. Klein 39 N.Y.2d 707). In the meantime they made a motion in the Art. 78 proceeding in the Appellate Division seeking to have the March 1, 1976 decision vacated as void. This motion was made on an affidavit setting forth the reasons for disqualification and exhibits attesting to the fact that Judge Latham had been a trustee of

the Bank when that decision was made, and Julius Granirer a co-trustee. (121A)

The Appellate Division treated this motion as one to re-argue and on re-argument by order and decision dated April 27, 1976, adhered to its original decision (64A, 65A) Judge Latham sitting but not voting.

Petitioners then for the second time and again in the Art 78 proceeding attempted again to appeal to the Court of Appeals on constitutional grounds and this appeal was dismissed on the court's own motion sua sponte. (Ellentuck v. Klein 40 N.Y. 2d 844).

Petitioners also in the 78 Proceeding attempted to have the judgment entered on the void Appellate Division decision, vacated, but the application was denied (67A).

It is on the basis of these decisions and orders that defendants claim the bar of res judicata and on which the District court dismissed.

Both on the law and the facts the dismissal was error.

POINT VII

UNDER THE NEW YORK STATE LAW, THE DECISIONS AND ORDERS OF THE APPELLATE DIVISION, SECOND DEPARTMENT DATED MARCH 1, 1976 AND APRIL 27, 1976 WERE VOID BOTH BECAUSE BASED ON A VOID DETERMINATION BY THE BOARD OF STANDARDS AND APPEALS AND BECAUSE OF PARTICIPATION THEREIN BY A DISQUALIFIED JUDGE .

The confirmation of the Board's void determination by the Appellate Division is itself void because even an Appellate Court cannot make valid that which is absolutely void by prohibition of law. The courts have no legislative power and cannot change legislative decree. As Judge Cardozo noted in the Matter of Merchant v. Mead Morrison M. CO. Inc. 252 N.Y. 284, 292, an award could be no more valid than the decision upon which it is based.

But even if the Board's decision had any claim to validity, it was subject to review by the courts by an Article 78 proceeding. Petitioners on such review as in any litigation were entitled to an impartial bench, not only impartial in

fact, but also in appearance.

Section 14 of the New York State Judiciary Law forbids a judge to sit as such or to take part in any decision in a case in which he has an interest. Where there has been such participation by a judge so disqualified, the cases hold the decision is not voidable but absolutely void.

Article 6, Sec. 20 (b)(1) of the New York State Constitution adopted November 7, 1961, effective September 1, 1962 forbids a judge to hold any other public office or trust except as a member of a constitutional convention or of the armed forces.

There is no dispute as to the facts. Judge Latham was a trustee of the Richmond Hill Savings Bank when he participated in the decisions and orders confirming the determination of the Board of Standards and Appeals. Judge Latham had probably retained the trusteeship because he had held same prior to 1962. There is no dispute that the record of proceedings before the Board, the basis for review by the panel of which Judge Latham was a member, contained the letter from his bank seeking favorable consideration for the variance because the bank claimed it would be seriously prejudiced if it were not granted, (119A, 120A) and other references to the Bank's interest, and also evidence that a co-trustee was acting both for the bank and a borrower from the Bank (121A, 122A).

Even if the participation in Judge Latham in the original March 1, 1976 decision confirming the variance was inadvertant, the decision is nevertheless under New York Law absolutely void. His participation in the "re-argument" made that decision equally void, even though he did not vote (64A, 65A).

The leading case on the subject involving an Appellate Division Judge is the case of Seaward v. Tasker supra, 143 N.Y.S. 257. In that case a judge at Special term held that the affirmance of a prior judgment by the Appellate Division, Second department, participated in by a judge who should have disqualified himself

was absolutely void, even though the judge did not vote (p. 271) and that no appeal could properly be brought before the Court of Appeals from a void decision (p. 267). The Court at page 267 stated:

> " * * * Although the determination of the Appellate Division on this appeal was void because of Mr. Justice Burr's participation in it when disqualified by law, an appeal is taken from it to the Court of Appeals by Mr. Wilson as though it were valid.
> (6) Third. The Court of Appeals was induced to entertain hear and decide this appeal by a species of fraud upon that Court in that the facts which disqualified Mr. Justice Burr from sitting below were not called to the attention of the Court of Appeals either by Mr. Williams in his brief or by Mr. Justice Burr in his opinion. The Court of Appeals was justified in relying on and did rely on the strong presumption existing in every case coming before it that a Justice of the Appellate Division would not sit in judgment in a cause in which he was disqualified from sitting, and that, if disqualifying facts existed, the justice affected thereby would voluntarily and of his own accord withdraw from the case."

and at page 271:

> "On this last appeal to the Appellate Division, again sat as a member of the Court, but the report of the case states he did not vote. It is not stated that he took no part in the court's deliberation or its decision therein. Even if it be the fact that Mr. Justice Burr actually took no part in the decision, it was unlawful for him to sit in the case. Section 15 of the Judiciary Law is in the alternative. It provides that a judge shall not sit as such, or take part in the decision of a cause or matter * * *"

In that case the decision in which the disqualified judge sat was vacated and the matter sent for hearing de novo, not only to another panel, but even to another Appellate Division Department, the Fourth.

In Oakley v. Aspinwall 3 N.Y. 547, where one member of the panel was disqualified, the judgment was vacated, the Court holding that the disqualified judge could not sit even with the consent of the parties. The disqualification cannot be waived. Queens Nassau Mortgage Co. v. Graham 157 A.D. 489, 142 N.Y.S. 589; People v. Berry 23 A.D. 2d 955, 259 N.Y.S. 2d 971.

In McLaughry v. Deming 186 U.S. 49, our Supreme Court cites the New York case of Oakley v. Aspinwall supra and states at page 68:

"A judge who is prohibited from sitting by plain direction of law, cannot sit, and the consent that he should sit gives no jurisdiction. It has been followed without doubt or hesitation in the State of New York ever since its rendition in 1850. People v. Connor 142 N.Y. 130 is among the latest of the cases on the subject. See also Sigourney v. Sibley 21 Pick. 101, 106; Gay v. Minot 3 Cush. 352; Hall v. Thayer 105 Mass. 219, 224; Chicago & Atlantic Railway Co. v. Summers 113 Ind. 10, 17."

In Matter of Bingham 127 N.Y. 296, the Court of Appeals state at page 311:

"The rule would be otherwise of the case within the statute, declaratory of the common law, that no judge can sit in a case in which he is a party or in which he is interested, or in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties (2 R.S. 275, Sec. 2). In such case his disqualification to sit as a judge cannot be waived so as to deny the right of a party to cause judgment to be vacated as void."

In re Murchison 349 U.S. 133, it was held that the interest sufficient for disqualification cannot be defined with precision, the circumstances and relationship must be considered. No man may try a case in which he is interested.

In Tumey v. Ohio 273 U.S. 510 it was held that a judge who has a direct personal interest in the outcome must be disqualified.

In Ward v. Village of Monroeville 409 U.S. 57, 61, 62, it was held that the financial stake need not be as direct or positive as it appeared to be in Tumey v. Ohio 273 U.S. 510, but petitioner is entitled to a neutral and detached judge in the first instance.

Transworld Airlines v. C.A.B. 254 Fed 2d 90; Am Cyanamid Co. v. F.T.C. 363 Fed. 2d 757, 401 Fed. 2d 574, cert. denied 394 U.S.920; Duffield v. Charleston Area Medical Center Inc. 503 Fed 2d 512, to the same effect.

The cases hold that not only must the panel deciding the case actually be fair and impartial, but even the appearance of fairness must be preserved. Wall v. American Optometrics Ass. Inc. 379 F.S. 175, aff'd 419 U.S. 888.

In Offutt v. U.S. 348, U.S. 11, 14, it was held that justice must satisfy the appearance of justice, and that interest applies to every situation which would offer a possible temptation to the average man as a judge.

In People v. Kohl, 17 Misc. 2d 320, 192 N.Y.S. 2d 83, the Court cites a number of decisions as follows:

> "(4) It is well established law in New York that the 'State is bound to furnish to every litigant not only an impartial judge, but one who has not by any act of his, justified a doubt of his impartiality' Moers v. Gilbert 175 Misc. 733, 737, 25 N.Y.S. 2d 114, 118, affirmed 261 App. Div. 957, 27 N.Y.S. 2d 425.
>
> ' " Courts should scrupulously maintain unsullied their dignity and integrity *** In the administration of justice it is not only requisite that a judge should be honest, unbiased, impartial and disinterested in fact, but equally essential that all doubt or suspicion to the contrary should be jealously guarded against and eliminated. Not only is it the duty of a judge to render a righteous judgment, but it is of transcendant importance to the litigants and the public generally that there should not be the slightest suspicion as to his fairness and integrity. Caesar demanded that his wife should not only be virtuous, but beyond suspicion. The people should not exact less from the judiciary, the most powerful branch of our government.'" People ex rel Union Bag & Paper Corporation v. Gilbert 143 Misc. 287, 288-289, 256 N.Y.S. 442, affirmed 236 App. Div. 873, 260 N.Y.S. 939."

See also People v. Whiteridge 144 App. Div. 493; Mtr. of the City of Rochester 208 N.Y. 188; Bradford Corp. v. Pious 392 Fed. 2d 67.

The fact that only one member of the bench making the decision was disqualified, and that the four remaining constituted a majority which under ordinary circumstances could make a valid decision, does not validate the void decision.

In Berkshire Employees Ass. v. Nat. Labor Relations Bd. 121 F. 2d 235, the Court held, page 239:

> "The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient. Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."

In The State, Winans v. Crane, 36 N.J.L. 394, one of the members of a Board of five authorized to act was disqualified. It was held that his acting rendered the whole proceeding void even if there was a majority of the committee left to act without his vote.

In Amos Treat & Co. v. Securities & Exchange Commission, 306 F.2d 240, 264, the Court, citing Berkshire Employees Ass. v. Nat. Labor Relations Board, supra reiterates that litigants are entitled to an impartial tribunal whether it consists of one man or twenty. Oakley v. Aspinwal, 3 N.Y. 547 supra to the same effect.

In People v. Corelli 343 N.Y.S. 2d 555, 41 A.D.2d 939, it was held that even the appearance of bias or prejudice, though none actually present, can be as damaging to the public confidence in the administration of justice as its actual presence.

In People ex rel Union Bag & Paper Co. v. Gilbert 256 N.Y.S. 442, 143 Misc. 287, aff. 260 N.Y.S. 939, 236 App. Div. 873, it was held that proceedings before a disqualified judge are absolutely void and a motion may be made at Special term before another judge to annull them.

In re Thom's Trust 24 A.D. 2d 536, 261 N.Y.S. 2d 304, the Court held that when orders were void because made by a disqualified judge, new life could not be breathed into them by use of nunc pro tunc but there should be full and new hearing as to all matters decided.

The interest Judge Latham had in the Article 78 proceeding before him was sufficient to disqualify him. The state of New York by constitutional amendment has forbidden judges since 1962 to act as trustees, obviously because conflicts of interest could well arise between their obligations as trustees and their duties as judges. Under the code of Judicial conduct, the term "fiduciary" includes a trustee. Cannon 3C (3)(b).

In re Reddish 2 N.Y.S. 259, the Appellate Division, Third Department held that where a judge was director and stockholder of a bank which was one of the petitioning creditors for the removal of an assignee, an order to show cause issued by him, although he resigned thereafter and before adjudication, was void, and the proceeding not properly before the court and could not be considered even

by his successor.

Other jurisdictions have similarly held. In King v. Thompson 59 Ga. 389, it was held that where a non-party bank had an interest in an attachment sought, the judge who was a director of that bank was absolutely disqualified.

In Kinnear-Weed Corp. v. Humble Oil & Refining Co. 403 Fed. 2d 437, a case that had been affirmed by the Court of Appeals in 1956 was re-opened in 1968 on an extraordinary petition on an allegation that the trial court judge had a "substantial interest" in the case within the meaning of the disqualification statute. The court held that the re-opening was not barred under the principle of res judicata although the Court of Appeals had previously denied post-affirmance relief on the same grounds, since whatever might be the usual consequence of res judicata, collateral estoppel or doctrines akin to them, they were no bar to the instant proceeding where the purity of the judicial process and its institutions were at stake. From page 439:

> "This is a matter which transcends the interests of the parties. The purity of the Judicial Process and its institutions are at stake. Whatever might be the usual consequences of res judicata, collateral estoppel or doctrines akin to them, we reject them here. They are not a defense, here or below."

The necessity for Judge Latham's disqualification was compounded by the fact, that not only had his bank gone on record as being prejudiced if the variance were not granted, but a co-trustee had acted in violation of the banking law by representing both the bank and a borrower from the bank. No matter how innocent or fair his intentions were, a whole community, resentful of the variance now knows about Judge Latham's connection with the bank and that Kimball's personal attorney is his co-trustee. In the interest of preserving the appearance of fairness the affirmance in which Judge Latham participated, whether or not he voted should be declared void.

Section 5711 of the CPLR provides that Appellate Division matters may be

sent to another Appellate Division Department in the interests of justice. As the cases hold the matter should have been sent to another department to be heard de novo. Certainly the void decision and order could not be validated by the same panel which had made the original void decision.

POINT VIII

THE SCOPE OF REVIEW OF AN ADMINISTRATIVE ACTION IN AN ARTICLE 78 PROCEEDING IS STRICTLY LIMITED BY STATUTE TO MATTERS IN THE RECORD OF PROCEEDINGS BEFORE THE ADMINISTRATIVE BODY. MATTERS EXTRANEOUS TO THE RECORD MAY NOT BE CONSIDERED OR DECIDED ON THE REVIEW

The New York City Charter and the Zoning Law provide that decisions of the Board of Standards and Appeals may be reviewed by the courts in proceedings in the nature of certiorari under Article 78 of the Civil practice Act. Sec. CPLR 7803 of that article strictly limits the questions that may be considered in such a proceeding and the courts have consistently refused to consider in such review any documents or information or matters not before the Board when its decision was made. The Article 78 proceeding may not review the constitutionality of any statute involved in the proceeding, but a separate action for declaratory judgment must be brought in such cases.

In Dun & Bradstreet v. City of New York 276 N.Y. 198, 206, it was held that where taxing officers are without jurisdiction, their acts are illegal and void and may be enjoined by a court of equity. Certiorari is not an adequate remedy or even a proper one, but an action for declaratory judgment is the appropriate remedy where the legality or the meaning of a statute is involved.

Where the facts are not in dispute, but the meaning and legality of the statute under which the administrative body is purporting to deal with the citizen, the courts will entertain declaratory judgment suits to pass on questions of law as to the statute's meaning and validity. Booth v. City of New York,268 A.D. 502, aff'd 296 N.Y. 573 where only questions of law are involved, action for declaratory judgment was improperly refused. New York Operators v. State Liquor

Authority 285 N.Y. 272, 276, reversing 259 A.D. 993.

A court's function in a proceeding to review is limited to a review of the record of proceedings before the Administrative Body. Brown v. Gabel 262 N.Y.S. 2d 632, 47 Misc. 2d 288; Matter of Freedman v. Weaver 3 N.Y.2d 123, 164 N.Y.S.2d 404, 143 N.E.2d 808.

In an Article 78 proceeding the Court may not review documents not before the Board on the original hearing. Levine v. New York State Liquor Authority 23 N.Y.2d 863, 298 N.Y.S. 2d 71, 245 N.E. 2d 804.

Facts not in the administrative record may not be considered in an article 78 proceeding by the reviewing court. Application of Ogden 273 A.D. 582, 79 N.Y.S. 2d 7. Courts will not concern themselves in such proceedings with matters extraneous to those raised in the petition. Collins v. Behan, 285 N.Y. 187, 33 N.E. 2d 86. In this case it was held that the entire record of the proceedings before the administrative tribunal must be before the court.

In Ferraro v. Coster 90 N.Y.S. 2d 166, 167 the attorney in an Art, 78 proceeding tried to bring to the attention of the court what he believed to be conflicts between the federal statutes and the City rent laws. Held this subject was not a matter before the court, for consideration by the court is limited on review to the actual proceedings as they were before the rent commission.

A decision by the Board of Standards and Appeals is not res judicata as to the validity of an ordinance even when sustained by certiorari. Arverne Bay Const. Co. v. Thatcher 278 N.Y. 222; Belleclaire Holding Corp. v. Klinghe 28 A.D. 2d 689, 280 N.Y.S. 2d 942 to the same effect.

In Matter of Merced v. Fisher 38 N.Y.2d 557 appellant attempted to go to the Court of Appeals on the issue of the constitutionality of a statute. Held, p. 559

"An Article 78 proceeding does not lie to review a legislative enactment (see e.g. Matter of Kovarsky v. Housing & Development Admin. City of N.Y. 31 N.Y.2d 184, 191, 192 and cases cited) The proper method to test the constitutionality of a legislative enactment is by an action for declaratory judgment ***."

In Steinman v. Nadjari 36 N.Y.2d 684, the Court of Appeals dismissed the appeal sua sponte on ground the constitutionality of a statute was not the only question involved.

In Matter of Friedman v. Cuomo 39 N.Y.2d 81 it was held that an Article 78 proceeding is an inappropriate vehicle to challenge the constitutionality of legislative enactments. Such matters must be raised in a separate action for declaratory judgment.

In the Matter of Overhill Bldg. Co. v. Delaney 28 N.Y.2d 449, the Court of Appeals held that the constitutionality of a zoning ordinance may not be questioned in an Article 78 proceeding. The case was dismissed without prejudice to the bringing of an action for declaratory judgment, the Court holding it would not even deem or treat the action as one for declaratory judgment because all the proper parties were not before it, such as the village trustees.

POINT IX

SINCE IN AN ARTICLE 78 PROCEEDING FOR REVIEW OF AN ADMINISTRATIVE DETERMINATION NO MATTER NOT IN THE RECORD MAY BE CONSIDERED, ANY ATTEMPTED RAISING OF AN EXTRANEOUS ISSUE CANNOT BAR SUBSEQUENT LITIGATION OF SUCH EXTRANEOUS ISSUE.

As has been heretofore stated, the petitioners in the Article 78 proceeding before the Appellate Division Second department seeking review of the Board's decision granting the subject variance, did not discover the disqualification of Judge Latham until after the decision confirming the variance had been made.

Petitioners then sought to vacate that decision by motion in the Article 78 proceeding on papers presenting additional facts and documents not part of the certified record of proceedings held before the Board of Standards and Appeals

(32A, 33A). That was petitioners' error. From the citations above, it is evident that no court in an Article 78 proceeding to review the Board's decision may consider such a matter which was not before the Board and therefore outside the scope of possible review. Petitioner's attorney admits she should have brought a separate proceeding for declaratory judgment if she wished to vacate the void decision, though petitioners were under no obligation to do so. The Appellate Division because the application had been erroneously made in the Article 78 proceeding then treated it as one to re-argue and on re-argument adhered to its original decision, Judge Latham participating in but not voting. Petitioners in their application had asked that the matter be sent for hearing de novo to another bench or Appellate Division, but re-argument may only be had before the same bench and on the same papers. Application of Central States Paper & Bag Co. 132 N.Y.S. 2d 69, aff'd 284 A.D. 841 134 N.Y.S. 2d 271.

Under Sec. 2221 of the CPLR any motion to re-argue a prior order or decision must be made to the same judge or bench and upon no new proof. Parker v. Rogerson 33 A.D.2d 284, 307 N.Y.S. 2d 986, appeal dismissed 26 N.Y.2d 964, 311 N.Y.S. 2d 7, 259 N.E. 2d 479. McKinney's Civil Practice Law and Rules, Book 7, Art 22, page 157. If the motion contains new facts it is a motion to re-new and not to re-argue. But since the application to vacate the void decision was on new facts not in the record of the proceedings before the Board of Standards and Appeals, the motion could not be considered in the Article 78 proceeding and could therefore not be treated as a motion to re-new. The new matter could not therefore be properly brought before the Court. A motion for re-hearing or re-argument must be based upon the original papers. Hauser v. Herzog 141 A.D. 522, 524; 126 N.Y.S. 2d 337, 338; In re Hooker's Estate 173 Misc. 515, 18 N.Y.S. 2d 107; Hamilton Park Builders Corp. v. Rogers 156 N.Y.S. 2d 891, 4 Misc. 2d 269; Public Service Com'n v. Grand Central C. Rent Corp. 53 N.Y.S. 2d 202, reversed on other grounds, 273 A.D. 595.

In Siletsky v. Third Ave. R. Co. 44 A.D. 632, 60 N.Y.S. 2d 405 the Court held:

> "The difficulty which the appellant has labored under, both in the Court below and in the presentation of his appeal before this court, is that he has not understood the nature of his second application before the court. He calls it an application for re-argument of the previous motion. This is clearly a misnomer, because a re-argument is always had upon the papers upon which the original motion was previously heard."

When the Appellate Division treated petitioners' application to vacate its decision confirming the variance on new papers showing Judge Latham's disqualification as a re-argument, it foreclosed any consideration of those new papers by the Court of Appeals had the Court of Appeals granted the motion for leave to appeal. Nor could the Court of Appeals consider this new matter when petitioners sought to present it in their papers opposing the motion to dismiss their appeal as of right, for the Court of Appeals has no original jurisdiction, Matter of Caruthers 158 N.Y. 131 and can only review determinations of other courts. CPLR Sec.5526.

Since constitutional questions can not be raised in an Article 78 proceeding, the Court of Appeals was obviously correct when it dismissed petitioners' attempt to appeal as of right on constitutional grounds.

When the Court of Appeals denied plaintiffs' motion for leave to appeal and petitioners had presented facts showing that the decision from which appeal was sought, was void, the Court was constrained to deny that application for it had no power at that point to consider the appeal at all, and when petitioners' mistakenly sought again to appeal from the order on re-argument, the same problem was presented. The Court of Appeals could not consider the matter of Judge Latham's disqualification.

Furthermore, re-argument is never a vehicle for seeking new forms of relief. Fox v. Abe Schrader Corp. 36 A.D.2d 591, 318 N.Y.S. 2d 548.

In Simpson v. Lockman N.Y.2d 990, it was held that "a motion for re-argument is not an appropriate vehicle for raising new questions such as those now urged upon us."

In Lo Porto v. Druiss Co. Inc. 241 A.D. 419, aff'd 268 N.Y. 699. It was held that an appeal from an order granting re-argument was appealable only so far as the original decision was re-affirmed.

Consequently the issue of whether Judge Latham was disqualified for interest has never been properly before any court and has never been litigated.

No issue that was never litigated can be the basis of bar by res judicata, collateral estoppel or issue preclusion. Since petitioners were legally under no obligation to vacate the void decision of the Appellate Division, their error in attempting to do so by the wrong method cannot bar them from their rights to have the void decision declared void. Plaintiffs were and still are entitled to bring action for declaratory judgment that the decision and orders of the Appellate Division Second department dated March 1, 1976 and April 27, 1976 are void for the reasons herein stated and that the variance granted by the Board of Standards and Appeals is void for lack of jurisdiction.

Plaintiffs have also never had a proper review of the determination of the Board of Standards and Appeals granting the variance, so that none of the issues raised before the Board can be considered final and binding.

Plaintiffs have chosen the federal forum to litigate their constitutional rights and their choice should not be disturbed. They are entitled to declaratory judgment as to those rights. Where a complaint is drawn so as to seek recovery directly under the constitution or laws of the U.S. Congress, the Federal court should take jurisdiction. Bell et al v. Hood et al 327 U.S. 678.

The Court's statement that plaintiffs should have sought direct appeal to the Supreme Court of the U.S. is erroneous (53A). A direct appeal, if granted, from an Article 78 proceeding could not bring up for review the issue of Judge Latham's disqualification or any other constitutional questions. Furthermore, since there is no appeal to the State Courts from a void decision, which must be attacked by a separate proceeding, plaintiffs could not possibly have gone to the supreme court

on these issues.

The application to Special Term to vacate the judgment entered on the void appellate division decisions, is subject to the same infirmity (34A). It was also brought in the Art. 78 proceeding, and therefore under the cases above cited could not be considered.

The principles of res judicata, collateral estoppel, issue preclusion or any other related principle cannot possibly bar plaintiffs' third cause of action, or any cause of action set forth in plaintiffs' complaint herein.

AS TO THE FOURTH CAUSE OF ACTION

In the fourth cause of action, plaintiffs seek a declaratory judgment declaring that those portions of the New York City Charter, the Administrative Code of the City of New York and the Zoning Law of the City of New York and the rules and regulations adopted by the Board of Standards and Appeals which permit deprivation of owners of real property of valuable property rights without due process of law, are unconstitutional and void, and for a judgment enjoining and restraining the conduct of future such hearings which result in or may result in loss of valuable property rights, without due process of law (35A through 40A).

POINT X

A DECISION OR JUDGMENT IN AN ARTICLE 78 PROCEEDING TO REVIEW A DETERMINATION OF AN ADMINISTRATIVE BODY IS NEVER RES JUDICATA IN AN ACTION FOR DECLARATORY JUDGMENT TO DECLARE UNCONSTITUTIONAL THE STATUTE OR PORTION THEREOF UNDER WHICH THE DECISION WAS MADE.

The decisions hereinabove cited in appellants' Points VIII and IX are authority for the principle that an Article 78 proceeding to review a determination of an administrative body is never a bar to a subsequent action to declare a statute unconstitutional under which that decision was made. New York CPLR Sec. 7803; Arverne Bay Construction Co. v. Thatcher 278 N.Y. 222; Merced v Fisher

38 N.Y.2d 557; Friedman v. Cuomo, 39 N.Y.2d 81 etc., supra.

The New York State court decisions hold that even where at first glance there would seem to be little merit to such actions for declaratory judgment on the constitutionality of a statute, the court should not dismiss but take jurisdiction and give judgment. Lanza v. Wagner, 11 N.Y. 2d 317, 229 N.Y.S. 2d 380, 183 N.E.2d 670, 97 ALR3d 344; Rockland Light & Power Co. v. City of New York, 289 N.Y. 45; Dun and Bradstreet v. City of New York, 276 N.Y. 198, 206, supra.

The Federal courts hold likewise. Bell, et al v. Hood, et al., 327 U.S. 678.

POINT XI

EVEN IN ADMINISTRATIVE HEARINGS, ALTHOUGH INFORMALITY MAY BE ACCEPTABLE, THE FUNDAMENTAL PRINCIPLES OF DUE PROCESS AND FAIRNESS MUST BE OBSERVED.

It is recognized that administrative hearings, both those involving personal liberties and property rights may be informal, may accept hearsay evidence and are not bound by the strict rules of evidence mandatory in a court of law.

Nevertheless there still must be present the essentials of due process. The leading case on the subject is Morgan v. U.S., 304 U.S. 1 which rules that in quasi-judicial hearings, property as well as individual liberty rights must be protected by the rudimentary requirements of due process.

Due process requires an opportunity for confrontation and cross examination, Willner v. Comm. on Character & Fitness, 373 U.S. 96.

Hearsay may be considered but if hearsay constitutes major area

of support there is a deprivation of due process. Copobianco v. U.S., 394 Fed. 2d 515.

Due process does not permit ex parte evidence not under oath and not subject to cross-examination. Hornsby v. Allen, 326 Fed. 2d 605.

Ex parte statements even when sworn, where there is no opportunity to cross-examine, may not be used as evidence, even under New York law. Matter of Stammer v. Board of Regents, 287 N.Y. 359; Matter of Carroll v. Knickerbocker Ice, 218 N.Y. 435.

In Hecht v. Monaghan, 307 N.Y. 461 it was held that where the exercise of statutory power adversely affects property rights, the Court implies that the fundamental principles of due process must be observed, and notes p. 474:

> "We also note that although petitioner has not raised the issue, and it is not necessary for us to pass upon it, that the record discloses that none of the witnesses was sworn, which means at this hearing the traditional safeguards to truthfulness developed in our common law were absent."

For years, by long custom and usage, hearings in zoning matters have been informal and loose in New York. Justification for such informality, including the failure to require oaths, has been claimed under a decision by Judge Cardozo in the case of Fordham Manor Reformed Church et al v. Walsh et al., 244 N.Y. 280 (1927) wherein he remarked that statements in administrative hearings do not have to comply with technical requirements applicable in court and then went on to say "they are not even under oath."

That decision may have been valid in the days when the rights of property owners to the protection of zoning laws were not given the

force of rights entitled to protection; but under the recent decisions above cited, that is no longer good law.

However, the New York City Board of Standards and Appeals still operates under that antiquated principle and the courts of New York in zoning matters seem to be loath to discard it.

An examination of the Rules of Procedure in zoning matters promulgated by the Board of Standards and Appeals shows that the rules for the conduct of hearings provides for adherence to none of the principles of due process except notice to adjoining landowners within a certain radius, but in practice, even this principle is not followed for the Board permits notices to be mailed to the mortgagees of the affected premises instead of the owners (126A).

Such rules as there are for the conduct of hearings are very general and vague and do not provide for the administration of oaths, and in practice none are given, and do not provide for cross-examination (Rule 5). The rule requires an opportunity for rebuttal, but in practice, parties are required to submit rebuttal in writting after the hearing, as the certified record and the minutes of the hearings show.

Rule 7 provides that interested persons may appear and voice their objections at the public hearing in person or by attorney, or in lieu of appearance may file their views in writing but there is no requirement that these views or statements shall be verified, or served on the opposition or even that the opposition be notified that such statements have been filed nor is any provision made for cross-examination or even rebuttal of such statements. The only requirement for verification seems to be that

persons filing such statements shall file an affidavit attesting to "their name, address and length of duration at the premises."

The record shows that the hearings themselves violate every principle of due process and that even when request is made for verification of written statements of expenditures, the Board, in the case at bar, refused to order same.

The rules of the Board of Standards and Appeals for the conduct of hearings in zoning matters affecting vital interests of adjoining property owners are utterly unconstitutional and should be declared void and the Board enjoined from proceeding further under such inadequate and unconstitutional rules.

Such Federal decisions as there are, uphold the principle that in zoning matters, at least, some of the fundamental principles of due process should be observed. Goss v. Lopez, 419 U.S. 565. In Joseph Skillkin & Co. v. City of Toledo, 528 Fed. 2d 867, it was held that owners of residential property have constitutional right to own property and not have its value destroyed without due process of law.

In their complaint, plaintiffs have alleged instances in line with the above decisions showing that the hearings before the Board were conducted without any regard whatsoever for even the most minimal requirements of due process (36A, 37A, 38A). These allegations must be accepted as true. Their correctness is substantiated by the records.

Ordinances have been held unconstitutional which delegate legislative powers such as rule making to administrative tribunals without proper guide lines. Novak v. Town Board of Poughkeepsie, 57 Misc. 2d 927,

293 N.Y.S. 2d 780; Noyes v. Erie & Wyoming Farmers Co-op Corp., 170 Misc. 42, 10 N.Y.S. 2d 114; City of Tonawanda, Resps v. Tonawand Theatre Corp., App. 29 A.D. 2d, 217; Packers Collegiate Inst. v. University of the State of New York, 298 N.Y. 184; In re Barone's Application, 187 N.Y.S. 2d 617, 18 Misc. 2d 10[illegible], 8 A.D. 2d 783, aff'd 7 N.Y. 2d 913.

In Panama Refining Co. v. Ryan, 293 U.S. 388, our Supreme Court held that the delegation of power without guidelines is void.

The only guide lines for the Board's proceedings to be found either in the Charter, the Administrative Code or the Zoning Law are the provisions of Sec. 72-21 of the zoning law (106A and 107A) which are so vague as to permit, as the record of this case shows, constant erosion of any meaning, for example, as in the case at bar, where it was held that the hardship is not self inflicted when Kimball purchased the premises knowing that the zoning law and the multiple dwelling law prohibit the alteration he sought, obtained an illegal permit for the alteration and then proceeded to go ahead with the alteration while litigation, to prevent the alteration, was pending. Thus by the simple expedient of obtaining an illegal permit and then proceeding with the alteration while litigation is pending, for courts are loath to grant temporary injunctions in such cases, an owner of property may lay the foundation for a claim of hardship and obtain a variance circumventing the law and violating the purpose of the legislation, and cause damage to the neighborhood and the owners of other parcels of property in the vicinity. Although prior law had forbidden such actions, Matter of Clark v. Board of Zoning and Appeals, 301 N.Y., 86 (One who knowingly acquires land for a prohibited use cannot have a variance on ground of hardship) and

Matter of Thomas v. Board of Standards and Appeals, 290 N.Y. 109 (Improvements made by owner with a view to laying subsequent plea for hardship should not be permitted), by permitting the Board such broad powers in making their own rules and permitting them to conduct hearings without any proper guide lines protecting due process, the Board can and has taken unto itself such wide discretion that it can and has been doing just as it pleases ignoring any law or prohibition that does not suit it, and the courts seem to refuse to interfere with such excessive exercise of discretion.

Especially injurious to plaintiffs was the ruling by the Board that Kimball, who was not sworn, need not produce any verification of his unsworn statements of the cost of the alteration submitted by him in proof of his alleged hardship. When petitioners at the hearings, by their attorney, demanded that Kimball produce his verification of his alleged costs, such as bills, checks, vouchers, contracts, payrolls, etc., the Board at first ordered him to do so, and then when he refused, claiming it would take him too long to gather this material, the Board refused to enforce its own directive stating "The Board in its jurisdiction and wisdom will make the determination whether the information is correct" to which petitioners' attorney replied "He can lie and put in a lot of facts and I have nothing to substantiate it" (pages 37, 38 and 39 of affidavit submitted for plaintiffs herein, document 16 of the index to the original record; 22A, 23A).

When we consider that the issue of how much Kimball had actually spent was the prime issue in his claim for hardship, such power permitted to the Board in violation of the most fundamental principles of due process and fairness, is an unconstitutional delegation of legislative power.

In opposing plaintiffs' motion for summary judgment on this fourth cause of action, defendant Board raised the issue that in this cause of action for declaratory judgment of the unconstitutionality of a statute, all the proper parties were not before the Court, to wit the City of New York which had delegated the power to the Board.

This may well be correct, but under the Federal Rules of Procedure, nonjoinder or misjoinder of parties does not authorize dismissal of an action and most certainly not with prejudice. The Court may always order the proper parties to be brought in.

POINT XII

IT IS THE ACCEPTED POLICY OF THIS CIRCUIT NOT TO EXTEND THE PRINCIPLES OF RES JUDICATA TO CIVIL RIGHTS CASES INVOLVING PROCEDURAL DUE PROCESS.

Plaintiffs have brought the instant action under the civil rights statutes, Title 42 U.S.C. A 1983 and 1985, and also under Title 28, U.S.C. Sec. 1343, 2201 and 2202 and allege deprivation of their constitutional rights under the United States Constitution, Amendments V and XIV. (4A)

Defendants claim that all issues presented by the claim have been previously litigated and adjudicated in prior state Court actions.

Aside from the principles of law hereinabove presented, which prohibit the bar of res judicata or principles akin to them in the within action, factually also, the defendants are mistaken.

Nowhere neither in the original 1972 plenary action (68A through 81A) nor in the Article 78 proceeding petition to review and annul the variance granted by the Board of Standards and Appeals (82A through 97A have

plaintiffs ever asserted or thereafter litigated their constitutional rights under the civil rights statutes or the 5th and 14th amendments. An examination of those documents, the complaint and petition, reveals no such allegations or demands or any allegations of conspiracy or claims of unconstitutionality of any statute or part thereof or of the nullity of the 1976 decisions and orders of the Appellate Division because of participation therein by a disqualified judge.

This circuit has consistently held that as a matter of policy it will not extend the principles of res judicata to civil rights actions involving procedural due process. Lombard v. Board of Ed. of the City of New York, 502 Fed. 2d 631.

In that case a teacher had challenged the validity of an order terminating her services in a second Article 78 proceeding, but had not specifically raised the 14th amendment therein, as in the case at bar.

This Court held that to apply res judicata to a remedy which need not first be sought in the state courts and which was not sought, would be to overrule the essence of Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 482, 5 L Ed. 2d 492, which holds the federal remedy supplemental to the state.

Newman v. Bd. of Ed. of the City School Dist. of New York, 508 Fed. 2d 277 to the same effect.

In Chicago Burlington & Quincy Rd. v. Chicago, 166 U.S. 226, the Supreme Court held that it has the authority to re examine the final judgment of the highest Court of a state where the ground assigned for a new trial is that the statute under which the case was instituted and the proceedings under it were in violation of the 14th amendment.

Furthermore, since there has never been a valid review of the determination by the Board of Standards and Appeals granting the subject variance, because of the disqualification of one of the judges participating in that review, the entire matter of the validity of the Board's determination is now open de novo. Under the law, petitioners, plaintiffs herein, are entitled to a proper review of that determination by an impartial court. Since they have been denied such review in deprivation of their constitutional rights, they have a right of access to the federal courts to enforce those rights.

CONCLUSION

The defendants have failed utterly to sustain their burden of proving their claims of res judicata to bar this civil rights action.

It was reversible error for the Court to dismiss the complaint before answer. The error is further compounded by the dismissal with prejudice.

The decision and order of the lower court should be reversed and the plaintiffs' given their constitutional rights to their day in court.

Respectfully submitted,

Dora Aberlin
Attorney for Plaintiffs-Appellants

ABERLIN

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 9 day of June 1977 deponent served the within BRIEF upon

Hon. W. Bernard Richland, Corp. Counsel
Hon. Louis J. Lefkowitz, Atty. Gen.
Sheldon Lobel, Esq. and
Frey & Harkow, Esqs.

attorney(s) for
Appellees

in this action, at
Municipal Building, NYC
2 World Trade Center, NYC 10047
60-10 Roosevelt Ave., Woodside, NY 11377 and
90-04 161st St., Jamaica, NY 11432

the address(es) designated by said attorney(s) for that purpose by depositing 2 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey
ROBERT BAILEY

Sworn to before me, this 9 day
of June , 1977

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978